RECORD
AND
BRIEFS

No. 16-285

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
PETITIONER

v.

JACOB LEWIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. § 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. § 2.

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Cases—Continued: **Page(s)**

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NLRB v. *Jones & Laughlin Steel*, 301 U.S. 1 (1937) 27

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Phillips Petrol Co. v. *Shutts*, 472 U.S. 797 (1985) . 20

Cases—Continued: **Page(s)**

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29 U.S.C. § 201 4

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Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989) 30

Miscellaneous–Continued: **Page(s)**

3 *Littler Mendelson's The National Employer* (2014) 30

New Oxford American Dictionary (3rd Ed. 2010).. 19

Restatement (Second) of Contracts § 178 (Am. Law. Inst. 1981)..... 24

Webster's Third New International Dictionary, Unabridged (2016)..... 19

BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

This case involves both the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA). Two provisions of the NLRA are at issue. The first, section 7 of the NLRA, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

The second, section 8(a) of the NLRA, 29 U.S.C. § 158(a), states:

> It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

The FAA provision at issue, 9 U.S.C. § 2, states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or

any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

A. Statutory Background

1. In the NLRA, 29 U.S.C. §§ 151 *et seq.*, Congress articulated "the policy of the United States" of encouraging collective bargaining and "protecting the exercise by workers of full freedom of association." 29 U.S.C. § 151. Section 7 of the NLRA expressly provides that "[e]mployees shall have the right * * * to engage in * * * concerted activities for the purpose of * * * mutual aid or protection." *Id.* § 157. This Court has described the rights under section 7 as including employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978).

In addition, the NLRA provides that any employer that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section [7]" commits an unfair labor practice, 29 U.S.C. § 158(a)(1), and this Court has held that the "acts which constitute the unfair labor practice [are] unlawful," *NLRB* v. *Express Publ'g Co.*, 312 U.S. 426, 436 (1941).

2. The FAA, 9 U.S.C. §§ 1 *et seq.*, provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

B. Factual Background And Court Proceedings

1. On April 2, 2014, petitioner Epic Systems Corporation (Epic), a healthcare software company, sent an email containing an arbitration agreement to some of its employees, including respondent Jacob Lewis. Pet. App. 1a-2a. The agreement required employees to bring all wage-and-hour claims through individual arbitration and stated that the employees waived "the right to participate *in* or receive money or any other relief from any class, collective, or representative proceeding." *Id.* at 2a. The agreement included a clause stating that if the "Waiver of Class and Collective Claims" was deemed unenforceable, "any claim brought on a class, collective, or representative action basis must be filed *in* a court of competent jurisdiction." *Ibid.* It also stated that employees were "deemed to have accepted this Agreement" if they "continue[d] to work at Epic." *Ibid.* (brackets in original). The email requested that recipients review the terms and acknowledge their acceptance by clicking two buttons. *Ibid.* The next day, Jacob Lewis, then a "technical writer" at Epic, did so. *Ibid.* "Epic gave employees no option to decline [the agreement] if they wanted to keep their jobs." *Ibid.*

2. In February 2015, Lewis sued Epic in federal court on behalf of a putative class of technical writers. Pet. 5-6. He alleged that Epic had misclassified those employees under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.* (FLSA), and Wisconsin law, Pet. App. 2a, thereby denying them required overtime pay, *id.* at 24a. Epic moved to dismiss the complaint, arguing that Lewis, through the arbitration agreement, had waived his right to bring in court any claim involving the payment of wages and any right to participate in class actions. *Ibid.*; *id.* at 2a. Lewis responded that the agreement was unenforceable because, among other reasons, it interfered with employees' right to engage in "concerted activities" under section 7 of the NLRA. *Id.* at 2a-3a. He also argued that pursuant to the arbitration agreement's own savings clause his class suit was properly brought in federal court. *Id.* at 25a. The district court agreed, relying on its own precedent in *Herrington* v. *Waterstone Mortgage Corp.*, No. 11-cv-779-bbc, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012), and denied Epic's motion to dismiss. Pet. App. 28a.

3. Epic appealed. It "argu[ed] that the district court erred in declining to enforce the agreement under the FAA." Pet. App. 3a. The Seventh Circuit, however, unanimously rejected its argument. The court noted first that section 7 of the NLRA provides that "employees shall have the right * * * to engage in * * * concerted activities for the purpose of * * * mutual aid or protection;" that section 8 "enforces Section 7 unconditionally by deeming that it 'shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of

the rights guaranteed in [section 7];'" and that "the [National Labor Relations] Board [(NLRB)] has, 'from its earliest days,' held that 'employer-imposed, individual agreements that purport to restrict Section 7 rights are unenforceable'" and has done so "with 'uniform judicial approval.'" *Id.* at 3a-4a. "[B]oth courts and the [NLRB]," the court added, "have held that filing a collective or class action suit constitutes 'concerted activit[y]' under Section 7." *Id.* at 4a (brackets in original).

"Section 7's text, history, and purpose," the court argued, "support this rule." Pet. App. 5a. "Collective or class legal proceedings fit well within the ordinary understanding of 'concerted activities,'" *ibid.*, the relevant statutory term, and "[t]he NLRA's history and purpose confirm that the phrase * * * should be read broadly to include resort to representative, joint, collective, or class legal remedies," *id.* at 6a. "Collective * * * legal remedies," the court reasoned, "allow employees to band together and thereby equalize bargaining power." *Ibid.*

The court alternatively held that "even if Section 7 *were* ambiguous—and it is not"—the NLRB's interpretation is "entitled to *Chevron* deference." Pet. App. 6a. (citation omitted). The court considered the NLRB's longstanding interpretation of sections 7 and 8 as "prohibit[ing] employers from making agreements with individual employees barring access to class or collective remedies," concluding that "[t]he Board's interpretation is, at a minimum, a sensible way to understand the statutory language, and thus we must follow it." *Id.* at 7a.

With these legal principles established, the court found that "[t]he question thus becomes whether Epic's arbitration provision impinges on 'Section 7 rights.' The answer is yes." Pet. App. 9a. The collective action ban, it held, "runs straight into the teeth of Section 7" and is therefore "unenforceable." *Id.* at 10a.

The court then turned to Epic's FAA arguments. First, it noted, "it is not clear to us that the FAA has anything to do with this case." Pet. App. 12a. Since the contract "states that if the collective-action waiver is unenforceable, then any collective claim must proceed in court, not arbitration[,] * * * we could probably stop here: the contract itself demands that Lewis's claim be brought in a court." *Ibid.* The court nonetheless proceeded to consider—and reject—Epic's argument that it "should ignore the contract's [own] savings clause because the FAA trumps the NLRA." *Ibid.*

"[T]his argument," the court noted, "puts the cart before the horse." Pet. App. 13a. As the court explained, "[b]efore we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all." *Ibid.* Because the FAA's own saving clause forecloses arbitration "upon such grounds as exist at law or in equity for the revocation of any contract [and i]llegality is one of those grounds[, a] contract provision[ ] like Epic's, which strip[s] away employees' rights to engage in 'concerted activities' * * * is illegal, and meets the criteria of the FAA's saving clause for nonenforcement." *Id.* at 15a (internal citation omitted). "[T]here is no conflict [in this case] between the NLRA and the FAA, let alone

an irreconcilable one," the court held. *Id.* at 14a. "Here the NLRA and the FAA work hand in glove." *Id.* at 15a.

Next, the court acknowledged and rejected the Fifth Circuit's "opposite conclusion" in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013) (*Horton II*). Pet. App. 15a. "There are," it noted, "several problems with [the Fifth Circuit's] logic." *Id.* at 16a. For starters, the Seventh Circuit pointed out, "[*Horton II*] makes no effort to harmonize the FAA and NLRA." *Ibid.* "Indeed, finding the NLRA in conflict with the FAA would be ironic considering that the NLRA is in fact *pro*-arbitration: it expressly allows unions and employers to arbitrate disputes between each other and to negotiate collective bargaining agreements that require employees to arbitrate individual employment disputes." *Ibid.* (internal citation omitted). Second, the court noted, "Sections 7 and 8 * * * say nothing about class arbitration, or even arbitration generally. Instead, they broadly restrain *employers* from interfering with employees' engaging in concerted activities." *Id.* at 18a. Third, it held, "finding the NLRA in conflict with the FAA would render the FAA's saving clause a nullity." *Id.* at 19a. As the court explained, "[i]f the NLRA does not render an arbitration provision sufficiently illegal to trigger the saving clause, the saving clause does not mean what it says." *Ibid.* The Seventh Circuit declined to address the other courts of appeals' decisions Epic cited, noting that "none has engaged substantively with the relevant arguments." *Ibid.*

Finally, the court rejected Epic's argument that section 7's right to collective action "is procedural only,

not substantive, and thus the FAA demands enforcement." Pet. App. 20a. "The right to collective action," it stated, "lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute." *Ibid.* In fact, it held, "Section 7 is the NLRA's *only* substantive provision. Every other provision of the statute serves to enforce the rights Section 7 protects." *Id.* at 21a.

The Seventh Circuit therefore affirmed the judgment of the district court. *Id.* at 23a. Epic petitioned for a writ of certiorari.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to review "whether Section 7 of the NLRA, which gives employees the right to 'engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection,' qualifies as a contrary congressional command sufficient to overcome the FAA's presumption" favoring arbitration." The courts below, however, decided a quite different question: whether the FAA's saving clause bars enforcement of a collective-action waiver that violates section 7 of the NLRA. Because petitioner misunderstands what the lower courts decided, it (1) mischaracterizes and exaggerates any split, (2) fails to address the merits of the issue the courts below actually did consider, (3) spins as "important and recurring," Pet. 4, an issue missing from the case, and (4) ignores several defects that make this case a poor vehicle to review the question it might actually present, let alone one it does not.

I. The Actual Split Is Shallow And May Resolve Itself Without This Court's Intervention

Petitioner claims that the courts of appeals are split "five to two" with the "Second, Fifth, and Eighth Circuits, as well as the Supreme Courts of California and Nevada," enforcing collective-action waivers and "the Seventh and Ninth Circuits" "[o]n the other side." Pet. 7, 11. This characterization overclaims by much. More careful evaluation reveals a shallower, less clear split that may well resolve itself without this Court's intervention.

Framing the issue correctly—as the Seventh and Ninth Circuits have done—largely dispels petitioner's alleged conflict. The proper question (the "saving-clause question") is (1) whether the NLRA makes collective-action waivers illegal and (2), if so, whether the FAA's saving clause nonetheless requires their enforcement. See *Morris* v. *Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080, at *7-8 (9th Cir. Aug. 22, 2016), petition for cert. pending, No. 16-300 (filed Sept. 8, 2016); Pet. App. 12a-15a. Most of the decisions petitioner discusses concern a quite different question: whether the NLRA or other statutes, particularly the FLSA, represent a "contrary congressional command," *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987), overriding the FAA. The saving-clause question, unlike the congressional-command question, does not ask whether the FAA stands in intractable conflict with another statute and, if so, which trumps. Rather, it asks whether the FAA's own saving clause renders particular contract provisions made illegal by another statute unenforceable under the FAA. Pet. App. 15a. Only three circuits have

analyzed and addressed *this question*. The Fifth Circuit has held that the FAA's saving clause requires enforcement of such provisions; the Seventh and Ninth Circuits have held that it bars their enforcement.

Petitioner mischaracterizes the depth of the split because it confuses these two different arguments. The "[i]mportant and recurring question," Pet. 4, it discusses is whether the NLRA represents a contrary congressional command, an issue the Seventh Circuit never decided, see pp. 4-8, *supra*; pp. 30-31, *infra*, not whether the FAA's saving clause independently forecloses enforcement of the collective-action waiver. The petition itself, in fact, makes this framing unmistakeably clear. It describes the "question presented [as] ask[ing] whether Section 7 of the NLRA * * * qualifies as a *contrary congressional command* sufficient to overcome the FAA's presumption that these agreements should be enforced according to their terms." Pet. 3 (emphasis added).

1.a. Petitioner relies mistakenly on *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), to demonstrate that the Eighth Circuit supports its "side" of the claimed split. Pet. 9-10. First, *Owen* involved a different statute, the FLSA, not the NLRA. The Eighth Circuit's analysis focused on whether there is an "inconsistency between either the FLSA text or its legislative history and the conclusion that arbitration agreements containing class waivers are enforceable in cases involving the FLSA." *Owen*, 702 F.3d at 1053. Finding none, it upheld the waiver at issue in the case. *Id.* at 1052-1053. In other words, the Eighth Circuit analyzed whether the FLSA contained a "contrary congressional command"

overriding the FAA. It nowhere mentioned, let alone analyzed, the FAA's saving clause and, although it discussed the NLRB's decision in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012) (*Horton I*), the court distinguished it as "limited * * * to arbitration agreements barring *all* protected concerted action," *Owen*, 702 F.3d at 1053, and notably refused the employee's "invitation to follow [*Horton I*]'s rationale" "given the absence of any '*contrary congressional command*' from the FLSA" to override the FAA, *id.* at 1055 (emphasis added).[1] To the extent the court weighed saving-clause concerns at all, it did so only in aid of a larger congressional-command argument and only in passing.

b. As petitioner observes, "[t]he Second Circuit agrees with the [Eighth]," Pet. 10, and thus suffers from the same weakness. Like *Owen*, *Sutherland* v. *Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013) (per curiam), nowhere mentioned the FAA's saving clause. Also, like *Owen*, it upheld the arbitration agreement largely because it found no "contrary congressional command" in the FLSA that would override collective action waivers. *Id.* at 295-297 (quoting *McMahon*, 482 U.S. at 226). The only time the opinion might possibly

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[1] For similar reasons, petitioner's other Eighth Circuit authority, *Cellular Sales of Missouri, LLC* v. *NLRB*, 824 F.3d 772 (8th Cir. 2016), does not help its cause. That case held that a collective-action waiver did not violate the NLRA without ever substantively evaluating any saving-clause argument or determining the proper relationship between the NLRA and the FAA. See *id.* at 776-778 (failing to mention or cite to FAA). In reaching its holding, moreover, *Cellular Sales* relied entirely on *Owen*, *id.* at 776 (noting that "our holding in Owen is fatal to [the NLRB's] argument"), which never decided these issues.

reference a saving-clause argument occurs in a single oblique sentence in which, quoting *Owen*, it "decline[s] to follow [*Horton I* because e]ven assuming that '[it] addressed the more limited type of class waiver present here, we still would owe no deference to its reasoning.'" *Id.* at 297 n.8 (quoting *Owen*, 702 F.3d at 1053-1054). But that oblique reference is unclear. *Horton I* made both saving-clause and congressional-command arguments under the NLRA. See *Horton I*, 357 N.L.R.B. at 2287-2288. *Sutherland* is thus best understood as analyzing the saving-clause argument the same way as *Owen*, the sole authority it quoted, did—as, at most, one small part of a congressional-command argument rather than as a saving-clause argument standing on its own.[2]

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[2] Petitioner has not discussed *Patterson* v. *Raymours Furniture Company*, No. 15-2820, 2016 WL 4598542 (2d Cir. Sept. 2, 2016) petition for cert. pending, No. 16-388 (filed Sept. 22, 2016), a non-precedential summary order filed by the Second Circuit on the same day petitioner filed its petition for certiorari. That order held that "[a]lthough the *Sutherland* court rejected *Horton I* in a brief footnote, it unquestionably rejected the NLRB's analysis and embraced the Eighth Circuit's position in *Owen*." *Id.* at *3. That careful characterization indicates that the *Patterson* panel believed that *Sutherland* had enforced the collective-action waiver because of "the absence of any 'contrary congressional command' from the FLSA," *Owen*, 702 F.3d at 1055, which is as far as *Owen* reached, not that it decided any saving-clause question. Such a view is completely consistent with "reject[ing] the NLRB's analysis" in *Horton I*, which covered, among other things, the congressional-command argument. Even if the *Patterson* panel did wrongly believe that the *Sutherland* court had decided the saving-clause claim, its view has no effect within the Second Circuit going forward. A non-precedential summary order cannot put an authoritative gloss, especially a mistaken

c. Unlike the Eighth and Second Circuits, the Fifth Circuit *has* rejected the freestanding saving-clause argument. In *Horton II*, it identified two separate reasons why a collective-action waiver might not be enforceable under the FAA—"(1) an arbitration agreement may be invalidated on any ground that would invalidate a contract under the FAA's 'saving clause' and (2) application of the FAA may be precluded by another statute's contrary congressional command," 737 F.3d 344, 358 (5th Cir. 2013) (internal citation omitted)—and analyzed each independently, *ibid.* ("The Board clearly relied on the FAA's saving clause. Less clear is whether the Board also asserted that a contrary congressional command is present. We consider each exception."); *id.* at 358-362 (analyzing each claim). *Horton II* held that this Court's decision in *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011), barred the saving-clause claim. "Like the statute in *Concepcion*," it stated, "the Board's interpretation is facially neutral [but its] effect * * * is to disfavor arbitration." *Horton II*, 737 F.3d at 359. Thus, because "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA[, t]he saving clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement." *Id.* at 360. The Fifth Circuit is the only circuit that has clearly rejected an independent saving-clause claim.[3]

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one, on a precedential opinion. It represents *at most* what one non-precedential panel thought a prior precedential panel had held.

[3] Petitioner also claims that two state supreme courts have sided with the Fifth Circuit. Pet. 11. Petitioner gets things at best half

2. Petitioner is correct that the Seventh and Ninth Circuits disagree with the Fifth. Pet. 11. Both hold that (1) the NLRA makes collective-action waivers in employment agreements illegal and (2) the FAA's saving clause therefore bars their enforcement. Pet. App. 15a ("Because the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's saving clause for nonenforcement."); *Morris*, 2016 WL 4433080, at *8 ("[W]e join the Seventh Circuit in treating the

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right. In *Iskanian* v. *CLS Transportation Los Angeles, LLC*, the California Supreme Court "agree[d] with the Fifth Circuit that, in light of *Concepcion*, the Board's rule is not covered by the FAA's savings [sic] clause." 327 P.3d 129, 141 (Cal. 2014). At the same time, however, that court correctly identified the Eighth and Second Circuits, on which it relied, as having weighed in on a different matter: "We * * * conclude * * * that sections 7 and 8 of the NLRA do not represent 'a contrary congressional command' overriding the FAA's mandate." *Id.* at 142 (citing *Sutherland*, 726 F.3d at 297 n.8, and *Owen*, 702 F.3d at 1053-1055).

In *Tallman* v. *Eighth Judicial District Court*, 359 P.3d 113 (Nev. 2015), the Nevada Supreme Court took a somewhat different approach. It correctly recognized the Fifth Circuit in *Horton II* as having rejected both the freestanding saving-clause claim and the claim that the FAA was "overridden by a contrary congressional command," *id.* at 123, but then its own opinion went on to reject only the argument that "the NLRA cannot fairly be taken as a 'contrary congressional command' sufficient * * * to override the FAA," *ibid.*, and it cited as authority only that portion of the California Supreme Court's opinion dealing with the congressional-command issue, *ibid.* (citing *Iskanian*, 327 P.3d at 142). It then identified the Eighth and Second Circuits as supporting only the view that "the NLRA cannot fairly be taken as a 'contrary congressional command' sufficient * * * to override the FAA," *ibid.* (citing *Sutherland*, 726 F.3d at 297 n.8, and *Owen*, 702 F.3d 1053-1055), not any holding concerning the saving clause.

interaction between the NLRA and the FAA in a very ordinary way: when an arbitration contract professes to waive a substantive federal right, the saving clause of the FAA prevents enforcement of that waiver."). In particular, both held that the NLRA's bar to collective-action waivers does not disfavor or target arbitration, as the Fifth Circuit claimed, and thus does not fall outside the scope of the saving clause. Pet. App. 16a-19a; *Morris*, 2016 WL 4433080, at *10 ("At its heart, this is a labor law case, not an arbitration case." "The contract here would face the same NLRA troubles if Ernst & Young required its employees to use *only* courts, or *only* rolls of the dice or tarot cards to resolve workplace disputes.").

3. When the Eighth, Second, and Fifth Circuits decided *Owen*, *Sutherland*, and *Horton II*, respectively, there was no circuit split—actual or perceived—and only one of those circuits, the Fifth, squarely decided the saving-clause issue. Since then, however, both circuits that have considered this issue for the first time have disagreed with the Fifth. The Seventh and Ninth Circuits have also made clear that saving-clause claims are different from claims asserting that the NLRA represents a "contrary congressional command" overruling the FAA and must be analyzed independently. Because the prior cases relied on a misplaced "consensus" at the time, *Sutherland*, 726 F.3d at 296, and because the Seventh and Ninth Circuits have now expressly addressed the NLRA saving-clause question and gone against the Fifth Circuit, the courts may resolve any conflict on their own without this Court's intervention. See Fed. R. App. P. 35.

The Fifth Circuit, in fact, expressly relied on this misplaced "consensus" in deciding *Horton II*. It was "loath," it stated, "to create a circuit split." *Horton II*, 737 F.3d at 362 (citing *Sutherland*, 726 F.3d at 297–298 & n.8, and *Owen*, 702 F.3d at 1055). It failed to notice, however, that the Eighth and Second Circuit cases it cited rested only on congressional-command, not saving-clause arguments, see pp. 9-11, *supra*. As the Seventh Circuit noted, the Eighth and Second Circuit cases nowhere "engaged substantively with the relevant [saving-clause] arguments." Pet. App. 19a. The Fifth Circuit's concerns about a split, then, were misguided at the time but ironically valid today. The Fifth Circuit now represents a minority view of one. It may thus—through an en banc proceeding—undo the same split it was "loath to create." *Horton II*, 737 F.3d at 362.

The Fifth Circuit denied a petition for rehearing of *Horton II* on April 16, 2014, *Horton* II, 737 F.3d 344 (5th Cir. 2013), reh'g denied, No. 12-60031 (Apr. 16, 2014); see *Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013, 1017 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016), but that was before the Seventh and Ninth Circuit decisions. Only after the Seventh Circuit issued its decision in this case would the Fifth Circuit have had any reason to reconsider the panel decision in *Horton II*. Since then, however, no one has asked it to reconsider *Horton II* en banc. Likewise, the Second Circuit in its non-precedential summary order in *Patterson* stated that "[i]f we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and

Morris, to join the Seventh and Ninth Circuits and hold that the * * * waiver of collective action is unenforceable." 2016 WL 4598542, at *2. Even if the *Patterson* court erroneously believed that *Sutherland* had decided the saving-clause question, see n. 2, *supra*, it correctly noted that an en banc proceeding could clear up any confusion, *Patterson*, 2016 WL 4598542, at *2.

In any event, further percolation would be helpful to this Court. Because none of those courts upholding collective-action waivers against saving-clause challenges had the benefit of the Seventh and Ninth Circuits' reasoning, and all but one of those courts had either failed to consider saving-clause claims at all or considered them only in aid of upholding a larger contrary-congressional-command argument, see pp. 9-15, *supra*, the issue warrants further development in the lower courts. This Court would benefit from further discussion in the courts of appeals and state supreme courts that actually focuses on the question presented. And there will be no shortage of appropriate vehicles now that the Seventh and Ninth Circuits have identified the proper issue. See, *e.g.*, *Bekele* v. *Lyft, Inc.*, No. 15-11650-FDS, 2016 WL 4203412 (D. Mass. Aug. 9, 2016) (upholding collective action waiver), *appeal docketed*, No. 16-2109 (1st Cir. Aug. 30, 2016).

II. The Decision Below Is Correct

A. The Seventh Circuit Correctly Determined That Epic's Waiver Of Class And Collective Claims Is Unlawful Under Sections 7 & 8 Of The NLRA

The Seventh Circuit correctly determined that section 7 of the NLRA grants employees a substantive right to pursue "representative, joint, collective, or class legal remedies." Pet. App. 6a. Both the plain language and purpose of the NLRA, as well as this Court's and the NLRB's interpretations of section 7, support this conclusion.

First, section 7 provides that "[e]mployees have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (emphasis added). This Court has explained that section 7's reference to "other concerted activities" protects employees "seek[ing] to improve working conditions through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978). As a result, both courts and the NLRB have consistently held that section 7 includes a right to collectively pursue work-related legal claims. See, *e.g.*, *Brady* v. *Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 of the [NLRA]."); *Altex Ready Mixed Concrete Corp.* v. *NLRB*, 542 F.2d 295, 296-297 (5th Cir.

1976) (same); *Leviton Mfg. Co.* v. *NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same).

The judicial consensus favoring a right to engage in collective legal action is unsurprising given the plain language of section 7. This Court has instructed that "[a]bsent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). When interpreting the language of a statutory provision, the court "giv[es] the words used their ordinary meaning." *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (quoting *Moskal* v. *United States*, 498 U.S. 103, 108 (1990)).

The ordinary meaning of "concerted" is "jointly arranged, planned, or carried out; coordinated." *New Oxford American Dictionary* 359 (3d ed. 2010); see also *Webster's Third New International Dictionary, Unabridged* (2016), http://unabridged.merriam-webster.com/unabridged/concerted (defining "concerted" as "performed in unison"). "Activities" are generally understood as "thing[s] that a person or group does or has done" or "actions taken by a group in order to achieve their aims." *New Oxford American Dictionary* 16 (3d ed. 2010); see also *Webster's Third New International Dictionary, Unabridged* (2016), http://unabridged.merriam-webster.com/unabridged/activity (defining "activity" as "an occupation, pursuit, or recreation in which a person is active"). Similarly, *Black's Law Dictionary* defines "concerted activity" as "[a]ction by employees concerning wages or working conditions; esp., a conscious commitment to a common scheme designed to achieve an objective." *Black's Law*

Dictionary 349 (10th ed. 2014). Thus, while the NLRA does not define "concerted activities," collective legal action fits easily within the term's ordinary meaning.

Second, the NLRA's underlying purpose further supports an interpretation of "concerted activities" that includes collective legal action. Congress enacted section 7 "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984). Collective legal remedies level the playing field exactly as Congress intended: they equalize employer-employee disputes by allowing employees to band together in confronting their employer. See *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985) (explaining how class action procedures allow plaintiffs who otherwise would "have no realistic day in court" to enforce their rights). This Court has found, moreover, "no indication that Congress intended to limit [section 7's] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *City Disposal Sys.*, 465 U.S. at 835. Adopting this Court's inclusive understanding of section 7, the court below appropriately concluded that "other concerted activities" include collective legal action. Pet. App. 4a-7a.

Third, the NLRB has interpreted section 7 to include a right to engage in collective legal action and the Board's interpretation is entitled to deference. This Court has "often reaffirmed that the task of defining the scope of [section] 7 'is for the [NLRB] to

perform in the first instance as it considers the wide variety of cases that come before it.'" *City Disposal Sys.*, 465 U.S. at 829 (quoting *Eastex*, 437 U.S. at 568) (noting that the NLRB's interpretations of ambiguous provisions of the NLRA are entitled to "considerable deference"). This Court has, moreover, repeatedly reviewed the NLRB's interpretations of the NLRA under the framework established in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). See *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 536 (1992); *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987). Under *Chevron*, the court must first determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If the court concludes that "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. If the statute is "silent or ambiguous" with respect to the question at issue, the question is whether the agency's interpretation is "based on a permissible construction of the statute." *Id.* at 843.

Here, Congress has unambiguously "spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Both the plain language and purpose of the NLRA support an interpretation of "concerted activities" that includes collective legal action. See pp., 18-20, *supra*. Even if one strained to find ambiguity where none exists, however, the NLRB has interpreted section 7 to include a right to engage in collective legal action. See *Horton I*, 357 N.L.R.B. 2277, 2281 (2012) ("[T]he substantive right to engage in concerted activity aimed

at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section 7."). To the extent Congress left any ambiguity, the Board's interpretation is eminently reasonable and thus "entitled to judicial deference." *Lechmere*, 502 U.S. at 536.

Furthermore, section 7's enforcement provision, section 8 of the NLRA, makes clear that contractual provisions that conflict with section 7 are unlawful. Section 8 declares that "[i]t shall be an unfair labor practice for an employer * * * to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. § 158(a)(1). This Court has held that contracts that "stipulate[] for the renunciation by the employees of rights guaranteed by the [NLRA]" are unlawful. *Nat'l Licorice Co.* v. *NLRB*, 309 U.S. 350, 361 (1940). In particular, in *National Licorice Co.*, this Court held that individual contracts in which employees prospectively waived their right to present grievances "in any way except personally" were unenforceable as "a continuing means of thwarting the policy of the [NLRA]." *Id.* at 360-361. The Court further explained in *J.I. Case Co.* v. *NLRB* that "[w]herever private contracts conflict with [the NLRB's] functions, they obviously must yield or the [NLRA] would be reduced to a futility." 321 U.S. 332, 337 (1944); see also *ibid.* ("Individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act."). In accordance with this inescapable

principle, the courts have, since the NLRB's earliest days, uniformly approved its decisions that contracts violating the NLRA are unlawful. See, *e.g.*, *NLRB* v. *Adel Clay Products Co.*, 134 F.2d 342, 345-346 (8th Cir. 1943); *NLRB* v. *Jahn & Ollier Engraving Co.*, 123 F.2d 589, 593 (7th Cir. 1941).

Epic's "Waiver of Class and Collective Claims" unambiguously violates section 8 by "interfer[ing] with" and "restrain[ing]" its employees' section 7 right to pursue collective legal action. 29 U.S.C. § 158(a)(1). For covered claims, the collective-action waiver prohibits employees from "participat[ing] in or receiv[ing] money or any other relief from any class, collective, or representative proceeding." Pet. App. 31a. One could scarcely imagine terms that more directly conflict with employees' right to pursue collective legal action under section 7. See *Eastex*, 437 U.S. at 565-566 (recognizing that section 7 protects employees "seek[ing] to improve working conditions through resort to administrative and judicial forums"). The waiver is therefore unlawful as an "unfair labor practice" under section 8 of the NLRA. 29 U.S.C. § 158(a)(1).

B. The FAA's Saving Clause Does Not Require Enforcement Of Arbitration Provisions That Violate Federal Statutes Such As The NLRA

The court of appeals was also correct in concluding that because Epic's contract violated the NLRA it was an unenforceable illegal contract falling squarely within the FAA's saving clause.

It is a fundamental principle of contract law that illegal promises cannot be enforced. See, *e.g.*, Restatement (Second) of Contracts § 178 (Am. Law. Inst. 1981) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable."). This Court has unequivocally held that "our cases leave no doubt that illegal promises will not be enforced in cases controlled by * * * federal law," *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 77 (1982), and that "court[s] ha[ve] a duty to determine whether a contract violates [the] law *before* enforcing it," *id.* at 83 (emphasis added).

Wisconsin contract law, moreover, which governs the dispute in question, holds that "[t]he general rule of law is, that all contracts which are * * * contrary to the provisions of any statute, are void." *Melchoir* v. *McCarty*, 31 Wis. 252, 254 (1872); *Roberts* v. *T.H.E. Ins. Co.*, 879 N.W. 2d 492, 502 (Wis. 2016). Under generally applicable state law, then, the agreement between petitioner and respondent was a legal nullity. Respondent cannot be forced into non-collective arbitration based on an agreement which never had legal effect under the contract law of the state.

The FAA does not mandate the enforcement of illegal promises such as the one at the center of this dispute. Foreseeing potential conflicts between the FAA and other statutes, Congress included a saving clause which states that arbitration agreements "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. § 2 (emphasis added). Thus, when an arbitration provision violates federal law, the

saving clause "prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield." *Morris* v. *Ernst & Young*, LLP, 2016 WL 4433080, at *7 (9th Cir. Aug. 22, 2016).

The saving clause recognizes a general defense of illegality. This Court has stated that the saving clause allows arbitration agreements to be invalidated by "generally applicable contract defenses," but not by "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)). Here, the contract defense of illegality does not apply only to arbitration or focus on the fact that an agreement to arbitrate is at issue. The problem with the collective-action waiver is not that it requires arbitration as a forum, but rather that it forbids collective action in *any* forum in violation of the NLRA. Asserting illegality under the NLRA, moreover, hardly disfavors arbitration. A contract forbidding collective action in court (without mentioning arbitration) would be equally invalid. Because the defense of illegality is a "generally applicable contract defense" that does not attack the arbitration clause itself, it falls squarely within the FAA's saving clause.

Nor can the collective-action waiver be saved, as one of petitioner's amici suggests, by calling it a "procedural," rather than a "substantive," provision. Pacific Legal Foundation Amicus Br. 5-8 (arguing that collective-action waivers are mere procedural rights which can be waived in arbitration). This Court has made clear that the FAA does not permit the

enforcement of contract terms that waive substantive rights. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute."). Here, the rights granted by section 7 of the NLRA are clearly substantive. In distinguishing between the substantive and procedural protections of federal statutes, this Court has focused on the statutes' text, structure, and central purpose. See, *e.g.*, *CompuCredit*, 132 S. Ct. at 669-671 (judicial-forum provision not "principal substantive provision[]" of the Credit Repair Organizations Act); *Rodriquez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (judicial-forum and venue provisions in Securities Act not "so critical that they cannot be waived"); *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 726-727 (1988) (characterizing statutes of limitation as "procedural" for choice-of-law purposes but as "substantive" for *Erie*-doctrine purposes); *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, 109-110 (1945) (noting that a right to avoid litigation under a statute of limitations could be considered substantive); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 249 (1942) (holding that a burden of proof standard was substantive rather than procedural).

The text of the NLRA itself reflects the Act's substantive character, granting the "*[r]ight* of employees as to organization." 29 U.S.C. § 157 (emphasis added). And as the structure of the NLRA makes clear, without section 7 the Act would be rendered meaningless. The right of employees to collective action is the Act's central protection, not a procedural provision designed to further ends defined

elsewhere. And with respect to the Act's purpose, this Court has described section 7 as a statute which "guarantees labor its 'fundamental right' to self-organization and collective bargaining." *Allen-Bradley Local No. 1111, United Elec., Radio & Mach. Workers of Am.* v. *Wis. Employ't Relations Bd.*, 315 U.S. 740, 750 (1942) (quoting *NLRB* v. *Jones & Laughlin Steel*, 301 U.S. 1, 33 (1937)). The NLRB in turn has held that the right to collective action granted by section 7 "is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *Horton I*, 357 N.L.R.B. at 2286. Because section 7 creates a core substantive right, the FAA does not mandate enforcement of a provision that violates it. See *CompuCredit*, 132 S. Ct. at 669-671; *Rodriquez*, 490 U.S. at 481.

AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333, is not to the contrary. In that case, consumers asserted that an arbitration provision was unenforceable under a California state law that barred class-action waivers in most arbitration agreements. *Id.* at 337-340. This Court declined to read the FAA's saving clause as facilitating a state policy protecting low-value claims brought under other laws. Such a policy, it held, "st[oo]d as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 340, 343; see also *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310, 2312 & n.5 (2013). Likewise, in *Italian Colors*, the Court rejected a judge-made rule rendering class arbitration waivers unenforceable when the plaintiff's cost of individually arbitrating a claim exceeded the potential recovery. *Italian Colors*, 133 S. Ct. at 2310-2312. Those holdings

do not suggest that the FAA requires enforcing a contractual provision that directly violates a federal statute such as the NLRA. *Concepcion* and *Italian Colors* analyzed whether judge-made or implicit state statutory policies were incompatible with the FAA, not whether an arbitration provision violated the substance of another federal law.

To suggest that the FAA requires the enforcement of illegal contracts leads to surprising conclusions. If that were true, all one would need to do to effectively enforce an illegal contract would be to include an arbitration provision. Taken to its logical conclusion, petitioner's view would have breathtaking implycations. Courts, for example, could not decline to enforce arbitration provisions that violate other federal statutes, such as agreements not to compete in violation of federal antitrust statutes. But see *Kaiser Steel Corp.*, 455 U.S. at 77-79 (holding that a court should not enforce a contract that is in violation of federal antitrust laws); *Kelly* v. *Kosuga*, 358 U.S. 516, 521 (1959) (noting that a contract in violation of the Sherman Act "could not be enforced by a court"). At the extreme, if a party were willing to expose itself to criminal liability, a court would presumably have to enforce arbitration of a contract to murder for hire, even though such a contract is most repugnant to public policy. See, *e.g.*, *Green* v. *Pro Football, Inc.*, 31 F. Supp. 3d 714, 728-729 (D. Md. 2014) (citing *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 212 (1985)) (refusing to force arbitration because underlying dispute concerned provision "no more enforceable, even if lesser in degree, than a contract to kill, the universally illegal contract").

Nothing in this Court's jurisprudence requires the enforcement of an illegal contract simply because it contains an arbitration provision. And petitioner points to no case in which this Court has enforced an arbitration provision that violates a federal statute like the NLRA.

This Court's decision in *CompuCredit*, 132 S.Ct. 665, a choice-of-forum case which Epic relies heavily upon, see Pet. 14-18, does not help it. In that case, the Court characterized the issue as "whether claims under the [Credit Repair Organization Act (CROA)] can proceed in an arbitrable forum." 132 S.Ct. at 673. Here, the issue is not whether any particular forum, including arbitration, is appropriate, but rather whether a provision that illegally bars collective action in *any* forum can be enforced under the FAA. *CompuCredit* concerned, moreover, a completely different objection to arbitration: whether the CROA represents a "contrary congressional command," *id.* at 669-670, foreclosing arbitration. It nowhere discussed whether an illegal provision of a contract could be enforced under the FAA's saving clause.[4]

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[4] Petitioner's amici pile on with a farrago of additional arguments. The National Association of Manufacturers (NAM), for example, contends that review is imperative because the NLRA's venue provision, 29 U.S.C. § 160(f), allows parties to "receive contradictory decisions on the enforceability of the *same* agreement," NAM Amicus Br. 9, and because "the NLRB's definition of 'supervisors' * * * render[s] it difficult for employers to determine which employees may enter into an agreement with a class waiver," *id.* at 10 (emphasis omitted). The NLRA's venue provision, however, actually *protects* employers. So long as they "transact[ ] business," 29 U.S.C. § 160(f), in a circuit that enforces collective-action waivers, they can successfully overturn any

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The court of appeals was correct to conclude that since the collective-action waiver violates the NLRA the FAA's saving clause bars its enforcement.

III. This Case Is A Poor Vehicle To Decide The Question Presented

This case is a poor vehicle for this Court to decide petitioner's question presented for two reasons. First, the Seventh Circuit never reached it. As petitioner itself describes it, "[t]he question presented * * * asks

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NLRB decision that they have engaged in an unfair labor practice by asking employees to agree to such a waiver—even when another circuit has refused to enforce that same waiver in a private lawsuit.

This employer-protecting venue provision also explains the NLRB's nonacquiescence policy, which petitioner's amicus Pacific Legal Foundation (PLF) complains of, PLF Amicus Br. 8-12. As noted above, the NLRA's venue provisions allow NLRB orders to be reviewed in several circuits. Consequently, NLRB "nonacquiescence" is justified "by the fact that the venue provisions make it difficult for any particular court of appeals to insist on exclusive superintendence over the particular agency order." Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 682 (1989).

Similarly, employers have lived for ten years under the supervisory-status test clarified by the NLRB in *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 687 (2006). Although NAM complains about that test now, all the courts it cites as criticizing the NLRB's supervisory-status test actually criticized the test in place *before* 2006. See NAM Amicus Br. 11-12 (citing five cases criticizing pre-*Oakwood* test). A leading employment law treatise indicates, moreover, that "[m]ost employer representatives [have] *welcomed* the *Oakwood* decision as providing additional guidelines." 3 Littler Mendelson's The National Employer § 31.1.3(f) (3d ed. 2014) (emphasis added).

whether Section 7 of the NLRA * * * qualifies as a contrary congressional command sufficient to overcome the FAA's presumption that [collective-action waivers] should be enforced according to their terms."[5] Pet. 3. The Seventh Circuit decided a different question. It did not ask whether the NLRA represented a "contrary congressional command" overriding the FAA. To do so, it held, would "put[] the cart before the horse." Pet. App. 13a. It instead decided the case on straight-forward saving-clause grounds: "Because the [collective-action waiver] is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's saving clause for nonenforcement. Here, the NLRA and FAA work hand in glove." *Id.* at 15a; see also *id.* at 23a (similar). The Seventh Circuit held that it need not reach petitioner's contrary-congressional-command argument because "[i]n order for there to be a conflict between the NLRA * * * and the FAA, the FAA would have to mandate the enforcement of Epic's arbitration clause," which it did not. *Id.* at 13a-14a. The saving clause prevented that.

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[5] Epic's discussion of the saving clause shows how peripheral it is to its own question presented. The petition discusses the saving clause for only two pages in its merits section, see Pet. 18-20, and does so only to argue that the Seventh Circuit cannot be right because "there [would] never [be] any need to determine whether another federal statute qualifies as a *contrary congressional command*." *Id.* at 18-19 (emphasis added). It also makes the remarkable claim in passing that the FAA's saving clause does not recognize "illegality-based defenses [that] arise[] only in *some* contracts, not '*any* contract.'" *Id.* at 20 (quoting 9 U.S.C. § 2). But even petitioner agrees that the FAA's saving clause recognizes "classic universal defenses such as fraud and mistake," *ibid.*, which apply only to "*some* contracts," namely only to those involving fraud and mistake.

Id. at 15a. Because the FAA itself forecloses enforcing an illegal contract provision, "there is no conflict between the NLRA and the FAA, let alone an irreconcilable one," *id.* at 14a, which requires a "contrary congressional command" before the NLRA can trump, *id.* at 13a-15a.[6]

Second, the case is a poor vehicle to decide petitioner's or even respondent's question presented because the collective-action waiver itself contains a "savings clause," which is dispositive and avoids the need for any analysis under the FAA. This clause states that "[i]f the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the *exclusive forum* for such claims." Pet. App. at 25a, 35a (emphasis added). Under the plain language of the contract, if a court determines that the collection-action waiver is illegal (and therefore unenforceable) because it violates a federal statute or for any other reason, no more

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[6] For these reasons, the suggestion by petitioner's amicus Chamber of Commerce of the United States (Chamber) that certiorari is necessary in this case in order to "put before the Court all of the issues that must be resolved," Chamber Amicus Br. 23, is puzzling indeed. This case does not present the straightforward "'contrary congressional command' issue" that the Chamber believes this Court needs to consider, *ibid.*, and although it does present "the right-to-pursue-statutory-remedies issue," *ibid.*, so too does the petition in *NLRB* v. *Murphy Oil USA, Inc.*, 16-307 Gov't Pet. 10-19, a vehicle posing none of the problems this case does.

analysis is necessary. The contract itself proscribes arbitration in this case.

Both the Seventh Circuit and the district court rested their decisions primarily on the *contractual* "savings clause," which is unique to this particular case. The Seventh Circuit stated, in fact, that "[s]ince we have concluded * * * that the collective-action waiver is incompatible with the NLRA, we could probably stop here: *the contract itself* demands that Lewis's claim be brought in a court." Pet. App. 12a (emphasis added). It went on to discuss the FAA only because "Epic * * * contends that we should ignore the contract's savings clause because the FAA trumps the NLRA. In essence, Epic says that even if the NLRA killed off the collective-action waiver, the FAA resuscitates it, and along with it, the rest of the arbitration apparatus." *Ibid.* In other words, the Seventh Circuit considered the FAA's saving clause only because Epic claimed that the FAA somehow overrode the contract's own savings provision—a position the court rejected. *Ibid.*

The district court likewise rested its holding on the contract's savings clause rather than the FAA's analog. It stated that because "the arbitration agreement includes [its own] 'savings clause[,]' * * * if [the court] conclude[s] that the [collective-action] waiver is invalid, [Lewis's] challenge to the rest of the arbitration agreement is moot." Pet. App. at 25a. It

was the agreement itself, not the FAA, that resolved the dispute.[7]

If this Court believes that the saving-clause question is now worthy of review, it should grant certiorari in *Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013, 1017 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9. 2016). For starters, all cases deciding the saving-clause issue rely on the NLRB's decision in *Horton I*, 357 N.L.R.B. 2277 (2012), the reasoning of which *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), recapitulates. In this case, for example, respondent relied heavily on *Horton I* in opposing Epic's motion to compel arbitration. And the court of appeals did the same, citing the NLRB's decisions numerous times and concluding that "[t]he Board's interpretation is, at a minimum, a sensible way to understand the statutory language, and thus we must follow it" under *Chevron*. Pet. App. 7a. Because the NLRB is a full party in *Murphy Oil* and that case fully considered the saving-clause issue, that case would be the most appropriate vehicle for this Court to review the question, if it wishes.

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[7] The contract's own savings clause is, moreover, *broader* than its statutory analog. Whereas the FAA's saving clause forecloses enforcement "upon such grounds as exist at law or in equity for the *revocation* of any contract," 9 U.S.C. § 2 (emphasis added), the contract's own savings clause requires that "[i]f the [collective-action] waiver is found to be *unenforceable*, then any claim brought on a * * * collective * * * basis must be filed in a court of competent jurisdiction." Pet. App. 25a, 35a (emphasis added). By its own terms, the contract's savings clause bars arbitration if the collective-action waiver is unenforceable, not just revocable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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